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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GARRY DEWAYNE MASON, Defendant and Appellant.	C086617, C086591 (Super. Ct. Nos. 16FE022193, 16FE023265)

Defendant Garry Dewayne Mason's girlfriend caught him molesting his six-year old daughter, A., in the living room of their apartment. An argument ensued, and police were called. Police, unaware of the reason for the argument, instructed defendant to leave the apartment. Defendant left with A. and attempted to drive away. However, defendant had been drinking all day and soon crashed his car into a pole.

Defendant was arrested and charged in Sacramento County case No. 16FE022193 (the DUI case) with driving under the influence (Veh. Code, § 23152, subd. (a)—count 1), driving with a 0.08 percent or higher blood alcohol level (Veh. Code, § 23152, subd.

(b)—count 2), driving with a suspended license (Veh. Code, § 14601.2, subd. (a)—count 3), and misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)—count 4). As to counts 1 and 2, it was alleged that defendant had previously been convicted of a felony. Defendant pleaded no contest to count 2, admitted the prior felony, and the remaining counts in the DUI case were dismissed.

Following further investigation, defendant was charged in Sacramento County case No. 16FE023265 (the sex abuse case) with two counts of committing a lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)—counts 1 and 3), one count of sexually penetrating a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b)—count 2), and one count of committing a lewd and lascivious act upon a child under the age of 14 by force or fear (Pen. Code, § 288, subd. (b)(1)—count 4). Following a jury trial, defendant was found guilty as charged.

In this consolidated appeal, defendant argues the trial court committed prejudicial evidentiary errors in the sex abuse case, and failed to determine his ability to pay fines, fees, and assessments imposed in both cases. We reject defendant's claims of evidentiary error and find his challenge to the imposition of fines, fees, and assessments to be forfeited. Accordingly, we shall affirm the judgment.

I. BACKGROUND

A. The Incident on Thanksgiving Day

Defendant lived with his girlfriend, Anita, and their infant daughter in Carmichael. Defendant and Anita planned to spend Thanksgiving Day, November 24, 2016, with defendant's family in Richmond. At some point, it was decided that A., defendant's daughter from a previous relationship, would join them. A. lived with her mother and visited defendant once or twice a month.

Defendant and Anita picked A. up and headed for Richmond. However, defendant and Anita began fighting and eventually turned around and returned to Carmichael. Defendant and A. went to the store and played with the dog while Anita tended to the

baby. After some time, Anita went into the bedroom with the baby, leaving the door ajar. Defendant and A. were alone in the living room. After approximately thirty minutes, Anita heard A. say, "stop doing that, that hurts." Anita went to the door and looked out. She saw A. lying across defendant's lap with her face down, and her buttocks in the air. A.'s pants had been removed, and Anita could see defendant's hand in A.'s underwear. Anita watched for approximately 30 seconds and then entered the room, asking defendant "what the fuck was he doing." Defendant responded by pulling A.'s underwear down, rubbing her buttocks, and saying "this is my bitch." Defendant also declared, "I'm a molester."

Anita called 911. Sacramento County Sheriff's Deputy Barron responded and interviewed Anita and A. Anita told Barron that she saw defendant rubbing A.'s buttocks with his hand outside her underwear. A. told Barron that she had fallen asleep on the couch and had awakened to find defendant removing her pants and rubbing her butt. A. said that she asked defendant to stop, but he did not stop until Anita entered the room. As we shall see, A.'s story changed in the retelling.

B. The Jury Trial

Defendant was tried before a jury in December 2017. During the trial, A., then seven, initially testified that defendant touched her private part with his hand, but denied that he penetrated her with his finger. Moments later, however, she testified that she could not remember being awakened on the couch on Thanksgiving Day. She acknowledged that testifying was difficult for her.

A.'s mother, T.C., testified that she received a call from Anita between 10:00 p.m. and 11:00 p.m. on Thanksgiving Day. Anita told T.C. that she caught defendant with his hand in A.'s underwear. T.C. went to the apartment to pick A. up. A. similarly told T.C. that she had been asleep on the couch and awoke to find defendant's hand inside her underwear. A. told T.C. that defendant had been trying to put his fingers inside her. She

also said that she asked defendant to stop, but he did not. Anita and A. both told T.C. that defendant said, "I'm a child molester" upon being confronted.

The next morning, A. told T.C. about another incident in which she had been sleeping in the same bed as defendant, Anita, and the baby. According to T.C., A. recalled that defendant rubbed his "thing" on her "booty coo-coo part," and whispered, "I'm going to eat your pussy." A. told T.C. that she had not reported this incident before, as defendant said that he would "whoop her real bad" if she told, and she was scared. However, A. believed Anita knew what had happened.

T.C. took A. to the hospital. A. spoke with an emergency room nurse, Krystyna Ongjoco. Ongjoco testified that A. reported that her vaginal area hurt because defendant put his fingers there the day before. Police were called. Deputy Barron responded to the hospital, and spoke with A. for the second time in the emergency room. Barron testified that he asked A. to tell him again about what had happened the night before. As before, A. responded that she had been sleeping on the couch and was awakened by defendant taking off her pants and rubbing her butt. This time, however, A. reported that defendant had also taken off her underwear, rubbed her genitals, and stuck his fingers inside of her.

Barron testified that A. told him about another incident, some months earlier, in which she had been asleep in a bed with defendant, Anita, and the baby. According to Barron, A. reported that defendant had been naked and rubbed his penis on her butt. She tried to roll away, and defendant grabbed her leg and pulled her back towards him and said, "get back over here, I'm going to whoop you." Again, A. told Barron that she had not reported the incident the night before, as defendant had threatened to "whoop her."

A. was taken to the Sutter Health Bridging Evidence Assessment and Resources Clinic for a sexual assault examination. The examination was inconclusive. The next day, she was interviewed by Tong Vang, a social worker from Child Protective Services (CPS). Vang testified that A. told her the same thing she told her mother, the emergency room nurse, and, eventually, Deputy Barron: that she had been sleeping on the couch and

awoke to find defendant removing her clothes, that defendant rubbed her private parts underneath her underwear and put his fingers inside her, that she asked him to stop, but he did not. As before, A. reported that the encounter ended with defendant telling Anita, "I'm a child molester." A. also told Vang about another incident in which a naked defendant "rubbed his thing on her butt." A. told Vang that she tried to get out of bed to tell Anita, but defendant grabbed her leg and pulled her back under the covers.

Vang also testified that she spoke with Anita, who claimed that she had only seen defendant rubbing A.'s buttocks and was not aware of any other sexual abuse of A. Vang explained that CPS was not only investigating the alleged abuse of A., it was also assessing Anita for general neglect and failure to protect. Had Anita been found to have been aware of sexual abuse of A., Vang explained, such a finding could affect her ability to keep her baby.

Anita testified that she was lying down with the baby on Thanksgiving Day when she heard A. say, "stop doing that, that hurts." She went to the door and saw defendant's hands moving around in A.'s underwear. She asked defendant "what the fuck was he doing." Defendant cradled A. in his arms, pulled her underwear down, and said, "this is my bitch." He then said, "[B]itch, I'm a molester." Anita acknowledged that she had dissembled when she told Deputy Barron and the CPS social worker that defendant merely rubbed A.'s buttocks outside her underwear. Anita explained that she minimized defendant's conduct because she wanted him to send money to provide for the baby, and she feared he might be released from jail and retaliate against her. Anita denied witnessing or hearing about any other incidents of molestation.

Recordings of defendant's jailhouse telephone calls to Anita were played for the jury. In one such call, made before the molestation charges were filed, defendant acknowledged that he "let the demons come out," and promised to "never do that shit again." He added that he had read the police report and understood that if Anita were

"really hateful towards [him]," she could have made things much worse for him with the police.

On cross-examination, Anita acknowledged that she had suffered felony convictions for assault with a deadly weapon and grand theft, and a misdemeanor conviction for obtaining money by false pretenses. She also acknowledged that she had not been forthcoming with police and the CPS social worker.

C. Verdict and Sentence

The jury found defendant guilty as charged in the sex abuse case on December 21, 2017. Defendant appeared for sentencing in both cases on January 19, 2018. The trial court sentenced defendant to thirty-five years to life in state prison in the sex abuse case. The trial court sentenced defendant to a concurrent term of two years in the DUI case. The trial court imposed various fines, fees, and assessments, including a $350 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $350 parole revocation restitution fine (Pen. Code, § 1202.45), which the court stayed, a $160 court operations assessment (Pen. Code, § 1465.8), a $120 court facilities assessment (Gov. Code, § 70373), a $367 booking fee (Gov. Code, § 29550.2), a $600 sexual battery fine (Pen. Code, § 243.4), a $500 sexual habitual offender fine plus $130 in related penalty assessments and administrative fees (Pen. Code, § 290.3), and victim restitution in an amount to be determined (Pen. Code, § 1202.4, subd. (f)). Defendant did not object to any fine, fee, or assessment based on an inability to pay.

Defendant filed a timely notice of appeal.

II. DISCUSSION

A. Exclusion of Evidence of Prior Reports of Sexual Abuse

Defendant contends the trial court erred in excluding evidence that A. made prior reports of sexual abuse at the hands of some neighborhood boys. Defendant argues the evidence was relevant and admissible to impeach Anita and A., whether or not the prior reports were true. Specifically, defendant argues that Anita, having failed to respond to

the reports, either (1) disbelieved A., suggesting that Anita held a low opinion of A.'s reputation for truthfulness, or (2) believed A., suggesting that Anita failed to protect her, and was therefore guilty of child endangerment. Either way, defendant argues the evidence should have been admitted for impeachment purposes. We are not persuaded.

1. Additional Background

As noted, defendant made a series of jailhouse calls to Anita. In one such call, which was not played for the jury, Anita apparently revealed that she told police A. was frequently left unsupervised in the company of some neighborhood boys. On cross-examination, Anita was asked whether she talked to police about A.'s neighborhood. Anita responded that she discussed some of the people that A. spent time with when her mother was gone. Defendant's trial counsel then attempted to introduce a new topic, apparently related to A.'s interactions with these people. The prosecutor objected and a chambers conference was conducted. Later, defendant's trial counsel explained for the record that he had been trying to elicit testimony concerning prior reports of sexual abuse by A., which Anita disclosed to police. According to defendant's trial counsel, Anita described her conversation with police, in a recorded call with defendant, as follows: "I told him about the boys in the apartments, how she'd be left alone. She told us one time she was raped and told us about the pants pulled down. I told the detective, too. And I said she always be at home a lot. She is left unsupervised."

Defendant's trial counsel argued that he should have been allowed to question Anita about A.'s apparent report—which counsel characterized as "false"—that someone other than defendant had sexually abused her. The trial court disagreed, stating the evidence was properly excluded under Evidence Code sections 782 and 352.[1] The trial court reasoned that the evidence concerned A.'s sexual history, and therefore implicated

[1] Undesignated statutory references are to the Evidence Code.

section 782, which establishes procedural requirements for admitting evidence of the sexual conduct of a complaining witness.[2] (See *People v. Fontana* (2010) 49 Cal.4th 351, 354, 362.) It was undisputed that defendant did not comply with these requirements. Accordingly, the trial court concluded the evidence should be excluded under section 782.

The trial court then considered the relevance of the proffered evidence, noting that any prior reports of sexual abuse could well be true. The trial court observed that evidence of A. having made such reports was entirely secondhand, consisting solely of Anita's statements to defendant that, "She told us one time she was raped and told us about the pants pulled down." The trial court also observed that Anita's statements lacked meaningful context, having been made without elaboration in the course of a hostile phone call in which Anita was torn between wanting to protect A., on the one hand, and herself, on the other. Under the circumstances, the trial court concluded that the evidence of A.'s prior reports was not relevant, as the jury would have no way to assess whether or not they were true.

The trial court then weighed the probative value of the proffered evidence against their potential for prejudice under section 352. The trial court concluded that the

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[2] Specifically, a defendant must file a motion "stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness." (§ 782, subd. (a)(1).) The motion must be accompanied by an affidavit, filed under seal, containing the offer of proof. (*Id.*, subd. (a)(2).) "If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant." (§ 782, subd. (a)(3).) At the hearing, the defendant must convince the court the evidence is relevant under section 780 and is not inadmissible under section 352. If the requisite showing is made, the court will issue an order specifying what evidence may be introduced and the nature of the questions to be permitted. (§ 782, subd. (a)(4).)

evidence had "nearly zero probative value . . . and is clearly outweighed by a possibility that a trier of fact would not be able to understand what to make of that, meaning improper prejudice or misuse by that type of evidence." Accordingly, the trial court affirmed its earlier ruling excluding the evidence.

2. Analysis

Defendant challenges the trial court's ruling, arguing that section 782 was inapplicable, and the prior reports were relevant, whether or not they were true. Defendant also argues that the evidence was more probative than prejudicial. We assume without deciding that section 782 was inapplicable. (See *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456 [section 782 inapplicable in sexual assault case in which victim was alleged to have made prior false report of rape "because it was [the complaining witness's] allegedly false complaints that the defense sought to use as impeachment evidence, not her prior sexual conduct or willingness to engage in sexual activity"].) But even assuming the trial court's reliance on section 782 was misplaced, the error was harmless, as the evidence was properly excluded under section 352.

We review a trial court's relevancy and section 352 rulings for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) A trial court abuses its discretion when its ruling exceeds the bounds of reason. (*People v. Beames* (2007) 40 Cal.4th 907, 920.) We cannot say that the trial court exceeded the bounds of reason in concluding that evidence of A.'s prior reports was irrelevant and inadmissible under section 352.

Evidence of a prior false complaint of molestation or rape is relevant to the complaining witness's credibility. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424.) But the prior complaint is relevant only if proven false. (*People v. Winbush* (2017) 2 Cal.5th 402, 469; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1097, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919; *People v. Miranda, supra,* at p. 1424.) The proponent of the evidence has the burden of establishing all preliminary facts pertinent to determining relevancy of the evidence. (§ 403, subd. (a)(1);

People v. Kaurish (1990) 52 Cal.3d 648, 693.) Defendant presented no evidence that A. was not raped or molested by neighborhood boys and made no offer of proof that any witness would so testify. The trial court did not abuse its discretion in concluding the evidence was not relevant for the purpose of impeaching A.'s credibility. (*People v. Winbush, supra,* at p. 469.)

Defendant argues the prior reports were relevant to impeach Anita, whether or not they were true. According to defendant, Anita either believed the reports, in which case they were relevant to show that she participated in child endangerment, or she disbelieved them, in which case they were relevant to show that Anita had a poor opinion of six-year-old A.'s reputation for truthfulness. We are not persuaded. Even assuming that Anita believed the reports, any claim that she participated in child endangerment, so far as A.'s exposure to the neighborhood boys was concerned, would have been speculative. What's more, the impeachment value of such a claim would have been minimal compared to other evidence casting doubt on Anita's credibility. Anita was already subject to impeachment for making inconsistent statements regarding the extent of defendant's abuse. She was also subject to impeachment with the CPS social worker's testimony that ran the risk of losing custody of her baby, and her own criminal history, which included crimes of moral turpitude. By contrast, courts have held that child endangerment does not involve moral turpitude, because the crime can be committed by "passive conduct unaccompanied by criminal intent." (*People v. Sanders* (1992) 10 Cal.App.4th 1268, 1274 [interpreting former Pen. Code, § 273a, subd. (1)].) On this record, the trial court could reasonably conclude that evidence of A.'s past reports was irrelevant to impeach Anita, even assuming Anita believed them to be true. To the extent that Anita believed the reports to be false, they were irrelevant for the reasons previously stated. (*People v. Miranda, supra,* 199 Cal.App.4th at p. 1424.)

Relying on *People v. Daggett* (1990) 225 Cal.App.3d 751, defendant argues the prior reports were relevant to show that A. had been subjected to sex acts by someone

other than he, which would rebut the argument that A. exhibited sexual knowledge that could only have derived from defendant's abuse. However, use of the prior reports for this purpose would entail an inquiry into A.'s sexual conduct (as opposed to the mere fact that she made reports), which would require compliance with section 782. (*People v. Daggett, supra,* at p. 757.) Having failed to comply with section 782, defendant has forfeited the argument that the reports were relevant to rebut an argument—which the prosecution does not appear to have made—that A. demonstrated sexual knowledge that could only have come from defendant's abuse. (*People v. Sims* (1976) 64 Cal.App.3d 544, 553-554.)

Even assuming the evidence of the reports was relevant, however, the trial court reasonably excluded it. Under section 352, a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Even relevant impeachment evidence is subject to exclusion under section 352. (*People v. Lucas* (2014) 60 Cal.4th 153, 240, disapproved on another point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.) Moreover, the exclusion of impeachment evidence on collateral matters, which have only a slight probative value on a witness's veracity, does not infringe on the right to confrontation. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 119.)

Defendant's trial counsel sought to impeach Anita on a collateral issue, which would have required a time-consuming digression into sensitive matters having no obvious connection to the matter at hand. Defendant's offer of proof was weak to nonexistent, consisting solely of Anita's representation to defendant that reports had been made, and defense counsel's characterization of those reports as false. Defendant's proposed use of the evidence to impeach Anita was wholly unnecessary given the

abundance of other evidence undermining her credibility. And, the evidence had no tendency in reason to prove or disprove any disputed fact. Under the circumstances, the trial court could reasonably conclude that the probative value of the proffered evidence was vanishingly low ("nearly zero"), and substantially outweighed by the probability that its admission would confuse the issues, mislead the jury, and necessitate an undue consumption of time. The trial court acted within its discretion in excluding the evidence under section 352. Because the trial court's ruling was not an abuse of discretion, defendant's constitutional claims also fail. (*People v. Panah* (2005) 35 Cal.4th 395, 484, fn. 32; *People v. Miranda, supra,* 199 Cal.App.4th at pp. 1422, 1426.)

B. Admission of Evidence of Uncharged Incident Involving J.D.

Next, defendant argues the trial court erred in allowing the prosecution to present evidence of an uncharged incident involving T.C.'s other daughter, J.D. Specifically, defendant argues the trial court erred in relying on section 1108, as the uncharged incident was not a "sexual offense" within the meaning of the statute. (§ 1108, subd. (a) ["In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352"].) Defendant also argues the trial court erred in ruling that the evidence was admissible under section 352. We perceive no error.

1. Additional Background

Prior to trial, the prosecutor filed a motion in limine to admit evidence of an uncharged incident in which a drunk and partially undressed defendant climbed into bed with J.D., who was then 12 years old. The prosecutor sought to use the evidence to prove defendant's propensity to commit the charged offenses. Defendant objected, arguing, as he does on appeal, that the incident did not amount to a "sexual offense" within the meaning of section 1108 because there was no evidence he touched J.D. The trial court rejected defendant's argument, reasoning that "a grown man intentionally getting into bed

with a minor child age 12 without any pants on or without any bottom clothing on, at least suggests the possibility of a sexual intent or sexual interest in the child . . . ." The trial court then considered whether the evidence was admissible under section 352. The trial court found that the evidence had probative value and was not more egregious or inflammatory than the charged offenses. The trial court also found that the evidence would not confuse the jury or necessitate an undue consumption of time. Accordingly, the trial court concluded that the evidence was admissible under section 352.

During the trial, T.C. testified that she lived in a two-story apartment in August 2011, when J.D. was 12 years old. Defendant sometimes slept over. When he did, he slept in T.C.'s bedroom, which was upstairs and across the hall from J.D.'s. One night, defendant appeared at T.C.'s apartment wearing low slung, sagging pants, with no underwear. It was late, and defendant was drunk. T.C. told defendant to go upstairs and lie down. Defendant went upstairs. A short time later, J.D. came downstairs. She was upset and angry because defendant came into her room and lay in her bed. T.C. went upstairs and found defendant hiding in her room.

J.D. testified that she had been sleeping in her bedroom and awoke to the sensation of heavy breathing on her face. She became aware that defendant was in her bed and pushed him away with both hands. Defendant responded by moving closer to her. J.D. looked down and saw that defendant's pants were sliding off. He was not wearing underwear, and J.D. could see his buttocks. J.D. ran downstairs to get her mother. During the trial, J.D. explained that she is a heavy sleeper and does not know whether defendant touched or rubbed her as she slept.

2. Analysis

Evidence of prior misconduct is generally inadmissible to prove conduct on another specified occasion or to prove a person's disposition to commit such an act. (§ 1101, subd. (a).) However, in a sex offense case, section 1108 permits admission of evidence of a defendant's commission of another sexual offense for the purpose of

showing propensity to commit such crimes. (§ 1108, subd. (a).) Both charged and uncharged prior sexual offenses may be admitted under this provision. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160, 1164.)

"To be admissible under section 1108, 'the probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." [Citations.]' [Citation.] 'The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses.' [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)

"On appeal, we review the admission of other acts or crimes evidence under . . . section 1108 for an abuse of the trial court's discretion. [Citation.] The determination as to whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or misleading the jury is 'entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.' " (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1097.) It is defendant's burden to demonstrate that the trial court abused its discretion. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 969, 977.)

Defendant argues the trial court erred in finding that the incident involving J.D. constituted a "sexual offense" within the meaning of section 1108. We disagree. Section 1108 defines "sexual offense" as "a crime under the law of a state or of the United

States," including "conduct proscribed by . . . Section . . . 647.6 . . . of the Penal Code." (§ 1108, subd. (d)(1)(A).) Penal Code section 647.6 prohibits " 'offensive or annoying sexually motivated *conduct* which invades a child's privacy and security.' " (*In re D.G.* (2012) 208 Cal.App.4th 1562, 1571.) A violation of Penal Code section 647.6 requires proof of the following elements: "(1) the existence of objectively and unhesitatingly irritating or annoying conduct; (2) motivated by an abnormal sexual interest in children in general or a specific child; (3) the conduct is directed at a child or children, though no specific child or children need be the target of the offense; and (4) a child or children are victims." (*People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396, fn. omitted.)

Here, the proffered evidence was that a partially undressed defendant climbed into bed with a sleeping J.D., breathing so heavily as to wake her. Although J.D. could not say whether defendant touched or rubbed her, she testified that he drew closer to her when she attempted to push him away. And, T.C. testified that she found him hiding in her room. A reasonable jury could conclude that a young girl, having been awakened by heavy breathing, by a semi-nude man in her bed, in the middle of the night, has been subjected to objectively and unhesitatingly irritating or annoying conduct, and could further infer that the man who engaged in such conduct was motivated by an abnormal sexual interest in children. (Cf. *People v. Jandres* (2014) 226 Cal.App.4th 340, 354-355 [where evidence showed the defendant put his finger in an 11-year-old girl's mouth, "a jury reasonably could posit that defendant's conduct carried a sexual connotation, such that it would not have been an abuse of discretion for the trial court to permit the jury to determine whether defendant's conduct violated Penal Code section 647.6"].) The trial court did not err in finding that the proffered evidence was sufficient for a jury to find, by a preponderance of the evidence, that defendant committed a "sexual offense" within the meaning of section 1108.

Defendant argues the trial court abused its discretion in weighing the evidence under section 352. Again, we disagree. Evidence that a defendant committed a "sexual

offense" under section 1108 "is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters." (*People v. Cordova* (2015) 62 Cal.4th 104, 132.) In deciding whether such evidence should be excluded under section 352, the trial court "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta, supra*, 21 Cal.4th at p. 917.)

Considering these factors, we see no abuse of discretion. The uncharged offense against J.D. was probative of defendant's propensity to be attracted to sleeping girls, and to act on that attraction. It was not remote in time, and there was little risk of confusing or misleading the jury. Defendant argues the offense against J.D. was not sufficiently similar to the charged offenses. But all of the offenses involved defendant waking a child in a state of undress and resisting attempts to get away from him. That J.D. was older than A., and managed to summon T.C. before an unlawful touching could occur, does not render the uncharged offense so dissimilar as to establish an abuse of discretion. Nor was there any abuse of discretion in the trial court's determination that the probative value of the evidence outweighed its prejudicial effect. To the contrary, the trial court carefully weighed the probative value of the proffered evidence against its potential for prejudice and reasonably concluded that the evidence was admissible. The trial court did not abuse its discretion.

C. Fines, Fees, and Assessments

Finally, in supplemental briefing, defendant argues the trial court erred by imposing fines, fees, and assessments without finding that he has the ability to pay them. As noted, the trial court imposed various fines, fees, and assessments in both cases, including a $350 restitution fine, a $350 parole revocation restitution fine (which was stayed), a $160 court operations assessment, a $120 court facilities assessment, a $600 sexual battery fine, a $500 sexual habitual offender fine (plus $130 in related penalty assessments and administrative fees), and victim restitution in an amount to be determined. Relying on *People v. Dueñas* (2018) 30 Cal.App.5th 1157 (*Dueñas*), defendant argues the imposition of these fines, fees, and assessments without an ability-to-pay hearing was a violation of his right to due process, equal protection, and the prohibition against cruel and unusual punishment. We are not persuaded.

In *Dueñas*, the defendant was an indigent, homeless, mother of two young children, afflicted with cerebral palsy, and barely surviving on public assistance. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160-1161.) Her driver's license had been suspended because she was unable to pay three juvenile citations, and she subsequently suffered a series of misdemeanor convictions for driving with a suspended license. (*Id.* at p. 1161.) In each case, she "was offered the ostensible choice of paying a fine or serving jail time in lieu of payment," but each time she was unable to pay and thus served time in jail. (*Ibid*.) When she suffered another misdemeanor conviction for driving with a suspended license, she asserted that she was homeless and receiving public assistance and asked the trial court to set a hearing to determine her ability to pay. (*Id.* at p. 1162.) The trial court struck some fees, but imposed the court facilities and court operations assessments, ruling that they were mandatory regardless of her inability to pay. (*Id.* at p. 1163.) On appeal, the *Dueñas* court found it was a violation of constitutional due process to impose the court assessments required by Penal Code section 1465.8 and Government Code section 70373, neither of which was intended to be punitive, without finding that

the defendant has the ability to pay them. (*Dueñas, supra,* at p. 1168.) The court also found that, although a restitution fine imposed under Penal Code section 1202.4 was considered additional punishment for defendant's crime, that fine posed constitutional concerns because the trial court was precluded from considering ability to pay when imposing the minimum fine authorized by the statute. (*Dueñas, supra,* at pp. 1170-1171.) To avoid the constitutional problem, the court held that Penal Code section 1202.4 requires a trial court to impose a minimum fine regardless of ability to pay, but that execution of the fine must be stayed until the defendant's ability to pay is determined. (*Dueñas, supra,* at p. 1172.)

In this case, the trial court imposed the same court facilities and court operations assessments that were imposed in *Dueñas,* as well as other, more substantial, fines and fees. Unlike the defendant in *Dueñas,* however, defendant did not request a hearing regarding his ability to pay any fines or fees, or object to them on any factual or legal ground. Thus, he forfeited his claim that the fines should not have been imposed on him. (*People v. McCullough* (2013) 56 Cal.4th 589, 596-597 [appellate forfeiture rule applies to challenge to the sufficiency of evidence supporting a booking fee under Government Code section 29550.2, subdivision (a)]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture rule applies to defendant's claim that restitution fine amounts to an unauthorized sentence based on his inability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [claim that trial court erroneously failed to consider ability to pay a restitution fine forfeited by failure to object]; *People v. Acosta* (2018) 28 Cal.App.5th 701, 705 [forfeiture rule applies to fines, penalty assessments and administrative fees pursuant to Pen. Code, § 290.3].)

Defendant argues his due process challenge to his sentence is not forfeited because it raises a pure question of law. We disagree. Defendant's challenge is premised on an alleged inability to pay, which is a factual issue that was not raised in the trial court. Alternatively defendant argues that a due process objection to his fines would have been

futile because he did not have the benefit of the *Dueñas* decision at the time of his sentencing hearing. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 488-489; but see *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155 [positing that *Dueñas* was based on settled principles of due process].) However, the fact that *Dueñas* announced a new rule is beside the point of this case. Forfeiture did not result from defendant's failure to make a due process objection, but rather from his failure to request a hearing or otherwise dispute his ability to pay any of the fines.

In contrast to *Dueñas*, defendant's ability to pay was a statutory consideration with respect to some of the most significant fees and fines imposed, including the $350 restitution fine, the $367 booking fee, and the $500 sexual habitual offender fine. (See Pen. Code, § 1202.4, subd. (d) [outlining factors the trial court must consider when setting the amount of a restitution fine above the $300 statutory minimum, including the defendant's "inability to pay"]; Pen. Code, § 290.3, subd. (a) [specifying that the defendant shall receive a fine of $300 upon the first conviction and $500 upon the second and each subsequent conviction, "unless the court determines that the defendant does not have the ability to pay the fine"]; Gov. Code, § 29550.2, subd. (a) [specifying that a judgment of conviction shall contain an order for payment of the amount of the booking fee "[i]f the person has the ability to pay"].) If defendant believed he was unable to pay any of the foregoing fines and fees, it was incumbent on him to object at sentencing and request an ability-to-pay hearing. (*People v. Nelson, supra*, 51 Cal.4th at p. 227.) Unlike the defendant in *Dueñas*, he had a statutory right to an ability-to-pay hearing that he failed to exercise, thereby forfeiting his claim that such a hearing was required. (*Ibid.*)

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

DUARTE, Acting P. J.

/S/

KRAUSE, J.